BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	

COMMENTS OF COMCAST CORPORATION

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Proposed Rulemaking ("*Notice*"),[1] which seeks comments regarding leased commercial access and program carriage issues. There is no apparent reason why the rules pertinent to either leased commercial access or program carriage require revision. In both areas, the Commission's rules have been carefully crafted and, in the case of leased access, refined in light of experience. In both areas, complaints have been infrequent, and such complaints as there have been generally have been resolved effectively and efficiently under the Commission's current rules. In neither area is there any reason for the Commission to adopt any new rules relating to arbitration, which the Commission has no authority to impose and which, in any event, any two disputants are free to agree to at any time.

I. INTRODUCTION & SUMMARY

There were dramatic differences between the Cable Communications Policy Act of 1984 ("1984 Cable Act"), the Cable Television Consumer Protection and Competition Act of 1992

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[1] *In re Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd. 11222 (2007) ("*Notice*").

("1992 Cable Act"), and the Telecommunications Act of 1996, but one central premise of all three of those statutes was the same: competition is preferable to regulation.[2] FCC Chairmen and Commissioners have reaffirmed this premise on innumerable occasions and pledged their commitment to let regulation diminish as competition increased.[3] In today's video marketplace, where consumers enjoy choices beyond what anyone imagined even a decade ago,[4] the Commission surely has better things to do than to explore creating new and unnecessary regulatory burdens, particularly ones that would intrude further on the editorial discretion of speakers protected by the First Amendment.[5]

In the case of commercial leased access, an obligation that applies to cable operators like Comcast and AT&T but not to direct broadcast satellite ("DBS") providers like DIRECTV and

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[2] *Compare* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780 ("1984 Cable Act") (codified at 47 U.S.C. § 521(6)) ("The purposes of this title [Title VI of the Communications Act] are to . . . promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."), *with* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463 ("1992 Cable Act") ("It is the policy of the Congress in this Act to-- (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; [and] (2) *rely on the marketplace, to the maximum extent feasible, to achieve that availability*[.]") (emphasis added), *and with* Telecommunications Act of 1996, Pub. L. No. 104-104, preamble, 110 Stat. 56, 56 ("1996 Telecom Act") ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[3] *See, e.g.*, *Nominations Hearing Before the S. Comm. on Commerce, Science & Transp.*, 109th Cong. (Sept. 12, 2006) (Statement of Kevin J. Martin, Chairman, FCC) ("If reconfirmed, I would continue to make decisions based on a fundamental belief that a robust, competitive marketplace, not regulation, is ultimately the greatest protector of the public interest.").

[4] In 2004, the Commission stated that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004). In the three short years since the Commission made this statement, consumers' choices only have continued to increase exponentially.

[5] As no fewer than eight Justices of the Supreme Court have declared, "There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) ("*Turner I*").

EchoStar, the *Notice* reopens a subject that the Commission already has examined carefully on multiple occasions. Rulemakings in 1992-1993 and 1996-1997 spelled out in abundant detail the obligations that apply to cable operators -- in terms of the capacity that must be made available, the procedures and timetables for handling requests, and the careful balance of statutory interests that governs the establishment of appropriate maximum rates. Since that time, cable operators have, in the open marketplace and wholly apart from commercial leased access, chosen to carry such huge quantities of unaffiliated programming that the underlying policy basis for leased access essentially has disappeared.[6]

As a result, leased access is now used in large measure to ensure the delivery of a surfeit of infomercial, home shopping, and other limited-appeal programming. Any further subsidization of leased access users likely will produce more of the same, with a corresponding loss of system capacity that is needed for programming and broadband services that cable customers truly want. Idealistic visions of more beneficial uses of leased access must be adjusted for two critical realities: the inherent infirmities of the typical leased access business model (which Congress acknowledged and accepted) and the growing number of alternative means by which entities can deliver their video content to viewers.

In the case of program carriage, the *Notice* asks only about the complaint process. This is a curious expenditure of Commission resources given that, in the 15 years since the program carriage provisions were enacted, *a grand total of two complaints have been filed*. Clear rules and the imperatives of a competitive marketplace make violations of the program carriage rules

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[6] For this reason, data on leased access channel usage cannot be a meaningful measure of the success of the rules. This is well illustrated by the fact that some significant leased access proponents when this matter was last before the Commission are now receiving widespread carriage on regular channels. Thus, any data reflecting instances of limited leasing may actually reflect increased access rather than any defect in the rules.

highly improbable. In the unlikely event that a meritorious complaint should arise, the existing complaint process already provides a vehicle for redress. There is no need to change the program carriage complaint process.

For both leased access and program carriage complaints, the *Notice* seeks to explore the use of arbitration. But parties that wish to resolve disputes through arbitration are already free to do so, and the Commission lacks authority to force parties to resolve their disputes in this manner.

II. THERE IS NO BASIS FOR CHANGING THE LEASED ACCESS RULES.

Congress established a variety of mechanisms, of which commercial leased access is one, in the hope of promoting "competition in the delivery of diverse sources of video programming" and the availability of the "widest possible diversity of information sources."[7] That objective has been achieved -- beyond Congress's wildest dreams.

In the more than two decades since the leased access rules were mandated by Congress, the video programming marketplace has changed dramatically and irreversibly. As shown below, the number of independent networks has skyrocketed, the range and depth of programming choices available to consumers have increased markedly, and vertical integration between cable operators and programmers has decreased substantially. Competition among multichannel video programming distributors ("MVPDs") is more intense than ever, and video downloads, streaming video, wireless broadband, and a host of other new technologies, services, and products are further expanding consumer choice. Congress's goals of competition and

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7 47 U.S.C. § 532(a).

diversity are being realized in ways no one could have imagined in 1984 (when leased access was first enacted) or 1992 (when the leased access statute was substantially revised).

Despite these successes, it is likely that a handful of parties will express disappointment that leased access has "not worked" -- at least in their view. If past is prologue, some will argue that flaws in the current rules -- and not the availability of numerous more efficient ways for programmers to reach audiences -- are what prevents more extensive and productive use of leased access. They will assert that the cost to purchase leased access time -- already set at bargain-basement prices, *as leased access users acknowledge* -- is too high, and that the Commission should make whatever adjustments are needed to ensure that leased access is used by an even greater number of potential programmers. Such claims are not based in economic reality, and the Commission should refrain from wasting time on developing new regulations that run counter to Congressional intent.

Since the adoption of the 1992 Cable Act, the Commission has painstakingly and comprehensively analyzed potential iterations of leased access regulatory regimes -- *twice*.[8] During both of these proceedings, the Commission carefully balanced promotion of diversity

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[8] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd. 510 (1992) ("*1992 Leased Access NPRM*"); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 ¶¶ 485-541 (1993) ("*1993 Leased Access Order*"); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report & Order and FNPRM, 11 FCC Rcd. 16933 (1996) ("*1996 Reconsideration Order and FNPRM*"); *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report & Order and Second Order on Reconsideration of the First Report & Order, 12 FCC Rcd. 5267 (1997) ("*1997 Leased Access Order*").

with a second explicit Congressional directive: that leased access must not adversely affect the operation, financial condition, or market development of cable systems.[9]

Since the Commission's last extensive order revising its rules in 1997, thousands of programmers have used leased access to transmit their programming. Hundreds of them use leased access channels on Comcast systems every day. To the extent programmers have chosen to use leased access to distribute their programming, the rules have worked exactly as the statute provides. Many programmers, however, have opted to reach audiences in ways that are ultimately more efficient than any version of leased access could ever be. Given today's hotly competitive and dynamic media environment, leased access is working as well as can be expected, especially given the inherent limitations of the leased access business model and Congress's guidance on the subject.

For these reasons, there is no rational basis for tinkering with -- much less overhauling -- the Commission's leased access regime. In particular, the Commission should resist calls to interfere with its current rate formula, which already provides programmers with the ability to purchase carriage on cable systems at well below marketplace prices. The Commission also must be careful not to take actions that would displace other programming or valuable new services that consumers desire in favor of more leased access channels laden with infomercials, home shopping presentations, and the like.

A. The Marketplace Is Fulfilling the Congressional Objectives Underlying Leased Access.

Congress first mandated that operators set aside channel capacity for commercial use by programmers in the 1984 Cable Act.[10] Leased access mandates were broadened in the 1992

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9 *See* 47 U.S.C. § 532(c)(1).

Cable Act, in which Congress explicitly directed the Commission to establish rules for determining maximum rates and terms and conditions for use of the service.[11] Congress hoped that expanded leased access requirements would help to "promote competition in the delivery of diverse sources of video programming" and "assure that the widest possible diversity of information sources are made available to the public."[12] In particular, Congress was responding to concerns that "cable operators might deny access to programmers if the operators disapproved the programmer's social or political viewpoint, or if the programmers' offerings competed with those the operators were providing."[13]

The updated leased access provisions were but one component of a comprehensive statutory regime intended to set conditions to spur competition in the video marketplace. Although Congress thought that leased access might be used as a tool by programmers to increase competition and diversity, it did not believe that leased access would necessarily be an integral means by which to achieve that result. The legislative history of the 1992 Cable Act shows that Congress did not intend to guarantee the success of leased access programmers and even knew that leased access might not be economically viable. As the Senate Report conceded, the "cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use."[14]

(…footnote continued)

10 *See* 1984 Cable Act § 2, 98 Stat. at 2782.

11 *See* 1992 Cable Act § 9, 106 Stat. at 1484-85 (codified at 47 U.S.C. § 532(c)(4)(A)-(B)).

12 47 U.S.C. § 532(a).

13 *See ValueVision Int'l v. FCC*, 149 F.3d 1204, 1206 (D.C. Cir. 1998).

14 S. Rep. No. 102-92, at 31 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1164.

Even the highly regulatory 1992 Cable Act established a strong policy preference for competition over regulation.[15] And that competition has arrived. DBS, which had zero customers in 1992, quickly attracted first five, then ten, then 15 million customers; today, DIRECTV and EchoStar serve almost 30 million customers, and are the second and third largest MVPDs in the country.[16] Cable responded to this competition with more than $110 billion of investment to upgrade plant, expand capacity, and introduce new services. A typical cable customer in 1992 was lucky to have 50 analog channels; today, a typical cable operator offers closer to 200 channels, and literally thousands of video-on-demand programs as well, pursuant to voluntary, market-driven, mutually beneficial agreements. Any risk that a cable operator could exercise bottleneck power over programming distribution has long since been eliminated. In this richly competitive environment, in which Congressional objectives clearly are being met, there is no reason for the Commission to adopt more detailed or intrusive leased access regulations.

Concerns about "diversity" of programming -- or excessive vertical integration between cable operators and cable networks -- are dramatically attenuated as compared to 1984 or 1992. Independent networks have increased enormously -- both in raw numbers and as a percentage of all cable programming -- over the 23 years since leased access obligations were first adopted. In 1992, there were only "68 nationally delivered cable networks," and 57% of those networks were

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15 *See*, *e.g.*, 1992 Cable Act, § 2(b), 106 Stat. at 1463 ("It is the policy of the Congress in this Act to . . . (2) rely on the marketplace, to the maximum extent feasible, to achieve th[e] availability [of diversity of views and information.]").

16 *See* Press Release, DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2007 Results* 2 (Aug. 9, 2007) (reporting that DIRECTV had 16.32 million subscribers as of June 30, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-earnings; Press Release, EchoStar Communications Corp., *EchoStar Reports Second Quarter 2007 Financial Results* (Aug. 10, 2007) (reporting that EchoStar's DISH Network had 13.58 million subscribers as of June 30, 2007), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=259236.

vertically-integrated with a cable operator.[17] Last year, the Commission reported that there were 531 national cable programming networks and that cable operators were vertically integrated with only about 20% of them.[18] And, assuming a pay-per-view network is counted on equal footing as a 24/7 linear network, that number is closer to 13.5%.[19]

The reduction in vertical integration is particularly stark when one examines the low percentage of cable system capacity being used by operators to carry networks that they themselves own. For instance, Comcast has attributable interests in less than 10% of the programming networks carried on its systems.[20] The growth in the number of diverse programming networks, both in terms of content and source, has been spurred both by the growth in the capacity of cable systems, as well as the development of a business model based on selling attractive packages of programming networks to consumers.[21]

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[17] H.R. Rep. No. 102-628, at 41 (1992).

[18] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶ 157 (2006) ("*Twelfth Annual Video Competition Report*") (reporting numbers as of June 30, 2005).

[19] In the *Twelfth Annual Video Competition Report*, based on data as of June 30, 2005, the Commission found that 21.8% of national programming networks were vertically integrated with cable operators, but this finding was based on a computation that counted iN DEMAND as if it was 60 separate networks. *See id.* ¶ 157 & n.568. The Commission noted that, "[i]f we count iN DEMAND as one network, 57 satellite-delivered national programming networks are vertically integrated with one or more . . . cable operator[]," *id.* ¶ 159, which would mean 57 out of the total 472 (or approximately 12.1%) national programming networks are vertically integrated with a cable operator. In February 2007, iN DEMAND reported that it now operates one HD network and eight multiplexed PPV channels. *See* Letter from Michael S. Berman, Senior Vice President, Business Affairs & General Counsel, iN DEMAND Networks, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 2 (Feb. 2, 2007). Factored into the Commission's analysis, this would bring the total of national programming networks to 480 and the number of cable-affiliated national programming networks to 65, or 13.5%.

[20] Comments of Comcast Corporation, MB Dkt. No. 06-189, at 61 (Nov. 29, 2006).

[21] The Commission's first a la carte report emphasized the importance of cable's bundling business model to both the viability of diverse networks and consumer choice. According to the Commission, bundling "enhance[s] consumer sovereignty by creating a mechanism for consumers to have access to a wide variety of viewing choices serving many diverse, niche viewer interests[,]" while "lower[ing] transaction costs, help[ing] programmers reach economies of scale and enhanc[ing] the attractiveness or convenience of the product to consumers." FCC, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public* 5 (Nov. 18, 2004).

In the past fifteen years, alternative distribution platforms also have flourished. Programmers have been able to achieve widespread distribution to millions of potential viewers in a growing number of ways. For instance, programmers can instantly access more than 13 million subscribers in every part of the continental United States by reaching a carriage agreement with the *smaller* of the two DBS operators. Programmers also can reach substantial and increasing numbers of viewers through any number of telcos and other overbuilders that provide cable service in competition with more traditional cable operators.

Programmers, including those that do not have enough content to fill an entire network, also have turned to the Internet, which provides an easy and inexpensive distribution option. According to research firm Broadband Directions, "While starting a new cable channel today takes an initial investment of $100 million to $200 million, a broadband channel needs just $5 million to $10 million to get going."[22] Programmers also can post individual programs on sites like YouTube for little or no cost to reach a large and growing audience. As of January 2007, 42% of adults online in the United States said that they had watched a video at YouTube and 14% said that they visit the site frequently.[23] Almost one in three (32%) of these frequent YouTube users say they are watching less television as a result of the time they spend there.[24] Because the Internet offers *worldwide* distribution at extremely low cost, even established media companies increasingly are launching new programming and entire programming networks

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22 Bobby White, *TV Channels Move to Web, Think Outside the Cable Box*, Wall St. J., Aug. 10, 2007, at B1.

23 *See* Press Release, Harris Interactive, *One-Third of Frequent YouTube Users Are Watching Less TV To Watch Videos Online* (Jan. 29, 2007) ("Harris Interactive Press Release"), *available at* http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1168.

24 *See id.*

online and are meeting with success.[25] As of October 2006, 74 out of the top 75 cable networks were offering broadband video on their websites.[26] Almost 41% of adults on the Internet say they have watched a video at a TV network website.[27] In addition to the Internet, program producers also have been able to secure carriage by reaching agreements with any of the hundreds of broadcast and cable networks that already enjoy wide distribution or by distributing their content via other new platforms like video-on-demand.

Although the 1992 Cable Act may have helped to set the stage, it was the marketplace that created the remarkable competitive developments in the video programming industry. By all indications, Congress's wishes for a fiercely competitive environment characterized by vast consumer choice of programming have been realized. Instead of needing to rely on agreements with government-dictated terms entered into pursuant to regulatory fiat, a competitive landscape emerged, as Congress intended, through the superior method of voluntary, market-driven deals.

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[25] NBC Universal and News Corp. will begin beta testing their online video venture named Hulu.com in October 2007. The site will offer programming including episodes of "Late Night with Conan O'Brien" and full-length films on AOL, Comcast, MSN, MySpace and Yahoo. *See Mass Media Notes*, Communications Daily, Aug. 30, 2007, at 9; David Goetzl, *"Conan" To Stream on Hulu*, MediaDaily News, Aug. 31, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=66678. For the past year, Cartoon Network has offered Toonami Jetstream, an online extension of its Toonami action-adventure TV franchise that provides full-length episodes of action and animé programs online. According to Cartoon Network, the Toonami Jetstream site "has streamed more than 115 million video segments in just its first year and attracted an average of 1.7 million unique visitors each month." Press Release, Cartoon Network, *Cartoon Network and VIZ Media Celebrate First Anniversary of Toonami Jetstream with a Power-Packed Expanded Show Lineup* (Aug. 7, 2007), *available at* http://www.viz.com/news/newsroom/2007/08_jetstream.php. The Independent Film Channel also has turned to the Internet, to "stream[] 22 short films called 'Trapped in the Closet' by the R&B recording artist R. Kelly." Michel Marriott, *Nothing To Watch on TV? Streaming Video Appeals to Niche Audiences*, N.Y. Times, Aug. 6, 2007. And the Jewish Television Network is "streaming music videos by Jewish performers, cooking shows and Israeli news programs. *Id*.

[26] *See* Press Release, Broadband Directions LLC, *New Market Intelligence Report Finds Broadband-Delivered Video Is Now #1 New Business Priority for Many Top Cable TV Networks* (Oct. 23, 2006), *available at* http://www.broadbanddirections.com/press_061023.html.

[27] Harris Interactive Press Release, *supra* note 23.

The fact that Congressional goals have been achieved without imposition of further regulation and without heavy reliance on leased access rules is something to be celebrated, not "rectified."

B. Reverse-Engineering the Commission's Carefully-Crafted Leased Access Rules Would Harm Cable Operators and Consumers.

Some critics doubtless are disappointed that leased access has not become a more popular means by which independent producers choose to distribute their programming. It is likely that these parties will urge the Commission to adopt dramatic changes to its leased access regime -- in particular, changes to the method by which rates for leased access time are calculated -- in order to increase the attractiveness of leased access. However, the Commission's duty is to implement the statute, which it has carefully and methodically done; it is not charged with formulating rules that guarantee widespread use of leased access. In fact, attempting to reverse-engineer the leased access regulatory regime in the hopes of making leased access a more attractive distribution alternative would risk upsetting the careful balance of statutory interests reflected in the current rules -- a balance that the U.S. Court of Appeals for the D.C. Circuit expressly recognized and approved.[28] It also would be unavailing. The fundamental impediment to growth of the leased access business model lies on the revenue side, not the expense side. The inherent flaws in the leased access business model cannot be cured in a manner that is consistent with the statute, and the most likely result of further tinkering with the leased access rules would be harm to cable operators and consumers in clear contravention of the Communications Act and Congressional intent.

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[28] *See ValueVision Int'l*, 149 F.3d 1204.

1. The Current Rules Are the Result of Careful Consideration by the Commission.

Since the passage of the 1992 Cable Act, the Commission twice has initiated rulemaking proceedings to consider various proposals for modifying leased access regulations.[29] In each proceeding, the Commission carefully considered comments from hundreds of interested parties about these proposals. The current rules are the product of that painstaking process.

The Commission's first comprehensive analysis was released in May 1993.[30] In the *1993 Leased Access Order*, the Commission revised its leased access rules to address a number of issues, perhaps the most important of which was to set a uniform formula by which cable operators were to calculate leased access rates -- the "highest implicit fee" formula.[31] In the *1997 Leased Access Order*, the Commission once again revisited leased access and completely overhauled its rules. Of particular note, the *1997 Leased Access Order* directly addressed the issue of rates and discarded the highest implicit fee formula in favor of an average implicit fee calculation.[32]

In both the 1993 and 1997 orders, the Commission correctly balanced Congress's interest in promoting distribution of programming via leased access -- thousands of programmers have

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29 *See generally 1992 Leased Access NPRM*; *1996 Reconsideration Order and FNPRM*.

30 *1993 Leased Access Order* ¶¶ 485-541.

31 *See id.* ¶ 519.

32 *See 1997 Leased Access Order* ¶ 31 (explaining that "[b]ased on [its] review of the comments," the Commission "no longer believe[d] that the proposed cost/market rate formula" was a "reasonable formula for determining maximum leased access rates" and "that the maximum reasonable rate for leased access programming . . . should be the 'average implicit fee'"). In making this determination, the Commission rejected the alternate cost-based fee formula that it had proposed in the *1996 Reconsideration Order and FNPRM* because of the specific drawbacks of that approach identified in the record. *See id.* ¶ 25 ("After reviewing the record in this proceeding and after considering and analyzing all of the options presented, we now conclude that the cost/market rate formula does not adequately account for certain factors which, if excluded, would make the maximum leased access rates resulting from the formula unworkable in today's programming marketplace.").

used these leased access rules to transmit their programming -- and protecting cable operators. As the D.C. Circuit acknowledged in affirming the Commission's adoption of the average implicit fee in the *1997 Leased Access Order*:

> The Act instructs the Commission to set rates sufficient to "*assure* that [leased access] will not *adversely affect* the operation, financial condition, or market development of the cable system." 47 U.S.C. § 532(c)(1) (emphasis added). The provision serves as more than a mere "caveat" to the ultimate goals of promoting leased access. The rates, terms and conditions of leased access must be set within its limits.[33]

Thus, the Commission's current leased access rules -- which are the result of the careful consideration of hundreds of comments on a wide variety of proposals -- appropriately implement Congress's intent in a manner consistent with the statute.

2. The Communications Act Constrains the Commission from Adopting Any Leased Access Proposals That Would Harm Cable Operators.

In sharp contrast to its notices of proposed rulemaking in 1992 and 1996, the *Notice* provides little indication of what the Commission hopes to achieve in the instant proceeding. Rather than delineating detailed proposals for revising the leased access rules, the *Notice* asks vague questions about the current usage of leased access and extends an open-ended invitation for proposals for changing the rules.[34]

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[33] *ValueVision Int'l*, 149 F.3d at 1209.

[34] A significant change in the rules can only be lawfully adopted as a "logical outgrowth" of a *Notice* that gives an indication of what the Commission proposes. Whether the "logical outgrowth" test is satisfied depends on whether the affected party "should have anticipated" the agency's final course of action based upon the initial notice. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). The "logical outgrowth" doctrine does not extend to a final rule that finds no roots in the agency's proposal because "[s]omething is not a logical outgrowth of nothing," *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994), nor does it apply where interested parties would have had to "divine [the agency's] unspoken thoughts," *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 740, 751 (D.C. Cir. 1991)). The agency must provide sufficient facts in the record for its proposal to allow for meaningful comment. *See, e.g., Chamber of Commerce of the U.S. v. S.E.C.*, 2006 WL 890669, at *8 (D.C. Cir. 2006) ("In essence, the question is whether 'at least the most critical factual material that is used to support the agency's position on review . . . [has] been made public in the proceeding and exposed to refutation.'"). By requiring the "most critical factual material"
(footnote continued…)

There is no evidence that the current leased access rules are not working exactly as Congress intended. Cable operators are meeting their obligations under the rules, and programmers appear to be encountering few instances in which operators are not properly fulfilling their duties.[35] In fact, within the past seven years, only 20 leased access complaints have been filed with the Commission -- an average of fewer than three per year.[36] And the number of leased access decisions from the courts is even lower; leased access has yielded only eight or nine decisions since passage of the leased access provisions in 1984. It is instructive that nearly all of those cases dealt with issues related to carriage of indecent or obscene programming via the leased access rules.[37]

(…footnote continued)

used by the agency to be subjected to informed comment, the Administrative Procedure Act provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[35] Comcast, for instance, responds to even the most onerous (and sometimes spurious) requests for leased access rate information. For example, in September 2006, The America Channel ("TAC") requested rate information for a 24-hour, 7-day per week programming network for "every available Comcast system in the U.S., in a tier actually used by most subscribers." *See* Letter from Kathleen Wallman, Counsel for The America Channel, to Arthur Block, Senior Vice President, General Counsel and Secretary, Comcast Corporation (Sept. 11, 2006). Every Comcast system produced the information, which Comcast then organized and provided to TAC. Predictably, TAC never bought so much as a second of leased access time, opting instead to simply toss the binders full of collated information on a scale and attempt to impress the Commission with their weight. *See* Letter from Doron Gorshein, President and CEO of The America Channel, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 10 (Nov. 29, 2006) (informing the Commission that the box containing Comcast's leased access information weighed 29 pounds). After dutifully providing the requested information, Comcast is still awaiting TAC's order for leased access time on "every available Comcast system in the U.S. in a tier actually used by most subscribers."

[36] *See generally* Public Notices of Special Relief and Show Cause Petitions providing information regarding leased access complaints filed since January 1, 2001.

[37] *See e.g., Life Without Shame v. Time Warner Entm't Advance/Newhouse P'ship*, 97-CV-6082T, 1997 U.S. Dist. LEXIS 16021 (W.D.N.Y. Sept. 11, 1997), *aff'd* 191 F.3d 256 (2d Cir. 1999); *Daniel A. Beck d/b/a Leased Access Productions v. Cablevision Sys. Corp.*, Memorandum and Order, 01-CV-804 (E.D.N.Y. 2001); *Goldstein v. Time Warner New York City Cable Group*, 3 F. Supp. 2d 423 (S.D.N.Y. 1998); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994); *Goldstein v. Manhattan Cable Television, Inc.*, 90-CV-4750, 1992 U.S. Dist. LEXIS 7628 (S.D.N.Y. May 22, 1992); *Media Ranch, Inc. v. Manhattan Cable Television, Inc.*, 757 F. Supp. 310 (S.D.N.Y. 1991); *Urban v. Manhattan Cable Television, Inc.*, 86 Civ. 1821, 1987 U.S. Dist. LEXIS 9174 (S.D.N.Y. Oct 13, 1987). As discussed in more detail below, *see infra* note 41 and accompanying text, leased access is most

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The Commission's responsibility, which it already has ably performed, is to implement the leased access provisions of the Communications Act. And, although certain commenters in this proceeding likely will argue that the Commission has a duty to do something more -- to guarantee the widespread use and success of leased access -- the Commission does not have the authority to mandate whatever regulations it may conclude would make leased access an attractive business model for a larger number of programmers (although one would not know it based on the expansive language of the *Notice*). As the D.C. Circuit explained, "Congress never intended to ensure financial success for leased access programmers. In fact, the Senate Report frankly acknowledged that leased access might not be economically viable."[38]

The Commission's ability to revise the leased access rules is constrained by Congress's injunction that it refrain from "adversely affect[ing] the operation, financial condition, or market development" of cable systems in implementing any leased access regulations.[39] Moreover, with respect to the rates for leased access, "there shall be a presumption that the price, terms, and conditions for use of channel capacity . . . are reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[40] Increasing further the subsidy that leased access users already enjoy would directly conflict with Congress's express directives to the Commission. In particular, the Commission should take care not to overhaul its rate formula in an effort to engage in "results-oriented" rulemaking. "Reverse-engineering" the formula would

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often used for infomercials and home shopping programming -- programming that generates sufficient advertising revenues or other revenues paid directly by viewer to compensate for paying for carriage -- or for programming that is ill-suited for the basic or expanded basic tiers.

38 *ValueVision Int'l,* 149 F.3d at 1209.

39 47 U.S.C. § 532(c)(1).

40 *Id.* § 532(f).

not guarantee increased leased access usage, but it would impede the achievement of other important and explicit Commission and Congressional goals.

3. Leased Access Is Already Available at Discounted Rates and Further Discounts Will Not Remedy the Deficiencies Inherent in the Leased Access Business Model.

The main reason that most non-infomercial programmers pursue alternative methods to distribute their programming instead of using leased access likely has nothing to do with deficiencies in the Commission's rules in general or the leased access pricing formula in particular. Rather, programmers' efforts to find an audience elsewhere are the result of the limitations inherent in the leased access business model.

At the outset, it is important to understand that leased access is an anomaly in that it runs counter to how the typical relationship operates between a programmer and a cable operator (or, for that matter, with any MVPD). Most cable networks are dependent on two revenue streams: license fees from cable operators and revenues from the sale of advertising during their programming. Leased access programmers, however, *pay* cable systems to show their programs. Therefore, to generate sufficient funds to survive, a leased access programmer that pays anything for carriage inevitably will need to find a way to extract more revenues than do other programmers from advertising or other revenues paid directly by viewers. That is why leased access is frequently used for infomercials or home shopping, hardly high-quality or high-value programming; in fact, approximately half of the leased access time purchased on Comcast's systems is used for this type of programming.[41]

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[41] Leased access also has been used to distribute programming that is ill-suited for carriage on basic or expanded basic tiers of service. For example, in Philadelphia, a leased access channel was used to distribute "The Strip-Tease Show," which featured exotic dancers in order to promote a 1-900 adult chatline. Additionally, in Detroit, leased access programming has included a "Falcomm Production" that featured advertisements for a

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The number of individuals or organizations that can afford to pay to create and acquire programming is inherently limited. The number that can do so *and* also pay for distribution is vastly smaller. Given these realities, it is not surprising that leased access usage is not as widespread as some critics may like, and there is very little that the Commission can do to change that fact because the law of economics will always prevail.

Leased access time is already priced at discounted rates. One need only compare the price of 30 minutes of leased access time on a cable system with the price of purchasing a 30-second advertising spot on a cable or broadcast network, or a one-page advertisement in a newspaper in the same market, to understand that leased access pricing is well below what that time would bear on the open market. For example, in Washington, D.C., each of the four network broadcast stations (WUSA, WRC, WTTG, and WJLA) currently charges approximately $7,500 for *thirty seconds* of advertising during primetime. The Washington Post currently charges approximately $15,800 for a one-time, quarter-page advertisement. In contrast, *thirty minutes* of leased access time during primetime on all of Comcast's systems in the D.C. metropolitan area would cost approximately $375 (or $6.25 per thirty seconds). Similarly, in San Francisco, California, three television stations (KGO, KPIX, and KTVU) each charges approximately $12,000 for *thirty seconds* of primetime advertising, and the San Francisco Chronicle currently charges approximately $19,800 for a one-time, quarter-page advertisement.

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gentleman's club and an adult website. Because cable operators are restricted from exercising editorial discretion over leased access programming unless the content is obscene or indecent -- both of which are vague legal standards that even the Commission has difficulty applying -- there is little that cable operators can do to prevent this type of programming from being shown. Attempts to use leased access channels for carriage of indecent or obscene programming have generated significant litigation. *See supra* note 37.

By comparison, *thirty minutes* of leased access time during primetime on all of Comcast's systems in the San Francisco area would total approximately $875 (or $14.59 per 30 seconds).

The Commission should not make the mistake of assuming that the limited use of leased access means that leased access rates are too high. As demonstrated above, the current leased access formula allows users to buy access to cable viewers at discounted wholesale prices, representing a fraction of the fair market value for that airtime or the cost needed to reach those consumers in other ways. Not even direct mail is cheaper. *These sentiments are not just those of Comcast; they are those of leased access users*.

For example, a number of websites and consultants tout "price" as the "primary factor" that differentiates commercial leased access "from regular commercial advertising."[42] As a website geared toward promoting leased access as a platform for chiropractic infomercials explains, "If you were to broadcast your chiropractic infomercials at the normal retail rate it would cost you a small fortune. . . . On the other hand, you can usually broadcast your chiropractic infomercials as 'leased access programs' for less than 10% of the normal retail advertising rates."[43] This same chiropractic infomercial website provides the following examples of leased access rates:

> As an example, on a large cable system in Cincinnati, Ohio (330,000 subscribers) you can air a 30-minute infomercial for $22.68*. In Anaheim, California, you can air an infomercial on a cable system of 40,000 subscribers for $9.92*. Some cable systems have leased access rates that are even lower than these. In Texas, a

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42 Gerry Cunningham, *Leased Access Overview* 2 (2001) ("*Leased Access Overview*"), *available for purchase at* http://www.geocities.com/leasedaccessinfo/pubs.htm. Mr. Cunningham's company offers information to programmers on how to purchase leased access time on local cable systems, provides consulting services, and does leased access placements for programmers. *See Leased Access Info.com - Frequently Asked Questions*, *at* http://www.geocities.com/leasedaccessinfo/frequent.htm (last visited Aug. 8, 2007).

43 JMS Videos, *How To Put Your Chiropractic Infomercials on TV Cheaply*, *at* http://www.jmsvideos.com/cheapadvertisingmarketing.html (last visited Aug. 22, 2007).

> cable system of 80,000 subscribers has rates as low as $2.65 per 30-minute broadcast. In Ohio, a cable company has rates as low as $1.70.[44]

Another website that promotes leased access for insurance policy infomercials points out that leased access is even cheap during hours when television viewership is at its highest: "The average cost for prime time viewing (7:00 PM thru 11:00 PM) on leased access cable channels in most markets is *an unbelievably low $150 to $200 per half-hour program*. This is less cost-per-thousand exposure than you spend annoying people with junk mail or telemarketing."[45]

Another leased access consultant explains that the reason that leased access is so cheap is because "*price is determined by a government-controlled formula; the regular method is determined by supply and demand.*"[46] Therefore, leased access is a "means to buy half-hour minimum blocks of airtime at wholesale prices. The difference between [leased access] and regular pricing usually ranges between 100% and 500%."[47] Within this system, leased access programmers "have the satisfaction of knowing [their] program is on the air at *pennies on the dollar* of what other advertisers pay for their time."[48]

4. Lowering Leased Access Rates Any Further Would Harm Cable Operators and Consumers.

It is hard to imagine how leased access prices could be reduced any further without creating extraordinary burdens on cable operators, in violation of the law. As noted above, the

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44 JMS Videos, *Everything You Wanted To Know About Leased Access Programming - The Cheapest Way To Broadcast Your Chiropractic Infomercials*, *at* http://www.jmsvideos.com/leased.html (last visited Aug. 22, 2007).

45 Free-Insurance-Leads.com, *Your Own 30-Minute TV Show Insurance Selling System Can Change Your Career from Chasing Clients To Attracting Them*, *at* http://www.free-insurance-leads.com/insurance-selling-system.html (last visited Aug. 24, 2007) (emphasis added).

46 *Leased Access Overview*, *supra* note 42, at 2 (emphasis added).

47 *Id.*

48 Gerry Cunningham, *Beginning Tutorial* 1 (2001) (emphasis in original), *available for purchase at* http://www.geocities.com/leasedaccessinfo/pubs.htm.

Communications Act states (and the D.C. Circuit expressly acknowledged) that the Commission, in designing leased access rules, must not "adversely affect the operation, financial condition, or market development" of cable systems.[49] This directive is underscored by Congress's creation of a presumption that the "price, terms, and conditions" offered by cable operators are "reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[50] Thus, the Commission must abide by an almost Hippocratic obligation when creating leased access rate formulas; any steps to promote programming diversity through leased access must avoid harming the operations of cable systems in the process.

The Commission already has pushed the outer limits of its authority on this. In the *1997 Leased Access Order*, the Commission took action to correct alleged overcompensation of cable operators for leased access time, instantly dropping leased access rates precipitously -- by 15-20%.[51] The Commission, however, did not make this decision in a vacuum, but carefully took into account improving market conditions for independent programming networks. The Commission acknowledged that the "number of non-vertically integrated national programming services" was steadily growing, but "believe[d] that a shift . . . to an average implicit fee formula [could] provide additional opportunities for diverse, unaffiliated programmers to enter the marketplace, without creating a maximum rate that is artificially low and putting the cable operator's operation, financial development or market development at risk."[52]

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[49] 47 U.S.C. § 532(c)(1).

[50] *Id.* § 532(f).

[51] 2 Charles D. Ferris & Frank Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite & the Internet* ¶ 15A.06[7][a] (2007).

[52] *1997 Leased Access Order* ¶ 35.

Given the dramatic increase in the number of independent programming services since 1997, as well as the accompanying decrease in the percentage of channels dedicated to programming services affiliated with cable operators, the Commission would be hard-pressed to justify any additional reductions in leased access rates. Lowering leased access rates any further would clearly harm cable operators. As noted above, the "average implicit fee" formula already produces below-market prices; it allows programmers to obtain distribution to large numbers of households at rates far below those charged by other media -- including cable's direct competitors -- for comparable space and time.

In addition, lowering leased access rates will harm consumers. Any increase in the use of leased access will necessarily come at the expense of other programming and services that consumers value. Cable bandwidth is, as always, constrained. Except as compelled by must-carry, PEG, and leased access requirements, every channel is being put to its highest and best use. In this environment, it is a constant struggle to find the bandwidth needed for new and innovative programming networks, additional high-definition channels, higher Internet speeds, competitive voice services, and other technological improvements highly sought by consumers. Any action to lower leased access rates would impinge on the availability of this bandwidth for video or any other services and therefore would "adversely affect the . . . market development" of cable systems, in direct contravention of the statute.[53]

A large influx of leased access programming would displace these new and improved services and impede achievement of longstanding Commission goals. For instance, it would be passing strange for the Commission to make it less expensive for home shopping programmers

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[53] 47 U.S.C. § 532(c)(1).

(or those marketing chiropractic services or insurance) to take up large chunks of bandwidth on leased access channels when doing so would lower capacity available for carriage of the high-definition and other innovative digital programming that Congress and the Commission have worked so hard to champion, and that consumers are now so eagerly consuming. Similarly, reducing leased access rates also would force cable operators to make difficult choices about whether they have sufficient space to carry new high-quality programming such as The Africa Channel or VeneMovies, or whether they have to drop existing programming, as they try to make room for more leased access home shopping programming and infomercials.[54]

Finally, purchases by programmers of leased access time at fire-sale prices also would take up space on cable systems that is dedicated to the provision of high-speed Internet services and facilities-based voice competition for more consumers. This would conflict with the Commission's stated goals of promoting the widespread deployment of these services. For instance, just last year in the *Adelphia Order*, the Commission cited the "accelerated deployment of competitive, facilities-based local telephone service to Adelphia's subscribers" as one of the "significant public interest benefits" that formed the basis for its approval of the Adelphia transactions.[55] And, in Congressional testimony earlier this summer, Chairman Martin highlighted Commission actions that "boosted competition in the delivery of voice" services and

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[54] Programming networks likely to be deleted would be those that attract smaller niche audiences, which would result in a loss of diverse programming in order to accommodate additional leased access home shopping and infomercial programming.

[55] *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corp.*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶ 110 (2006).

confirmed the Commission's "commitment to ensure that all consumers, regardless of where they live, benefit from competition in the voice" market.[56]

Lowering rates would not only impede distribution by cable systems of programming and services consumers demand, but also would reduce cable operators' ability to compete with alternative providers of video service, such as DBS operators, that are not forced to sell any of their capacity, let alone at the bargain-basement prices mandated by the leased access rules.[57] For all these reasons, changes in leased access rules cannot be justified.

III. THERE IS NO BASIS FOR CHANGING THE PROGRAM CARRIAGE RULES.

Robust competition and technology changes ensure that programmers have plenty of distribution outlets. With all the marketplace changes described above, and in particular with two DBS providers (both with nationwide footprints) each of which serves in excess of 13 million multichannel customers, programming networks today have significant leverage in negotiating carriage. This provides powerful marketplace discipline that reduces the need for regulation. An MVPD that fails to provide consumers with the programming they demand will quickly be left behind for MVPDs that do.

This does not guarantee that every programming network -- or would-be network -- will obtain carriage on every MVPD in every market. Capacity of cable and satellite systems remains constrained, and business and editorial judgments must be made. But there is far less reason than

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56 *Oversight of the Federal Communications Commission – Part 2*, 110th Cong. 2 (July 24, 2007) (testimony of Kevin J. Martin, Chairman, FCC), *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.072407.FCCoversightPart2.shtml. Additionally, Chairman Martin stressed that "[p]romoting broadband access and affordability remains one of our top priorities" and said that "competition among broadband platforms" was "[o]ne important factor spurring both increased broadband availability and reduced prices." *Id*. at 3-4.

57 DBS operators, while subject to some public interest obligations, are not required to provide programmers with opportunities to purchase time on their systems at below-market rates. *See* 47 U.S.C. § 335(b) (outlining DBS operators' carriage obligations for noncommercial, educational, and informational programming).

ever before for the government to be second-guessing those decisions, through program carriage complaints or otherwise.

The *Notice* seeks comment on "whether and how [the Commission's] processes for resolving carriage disputes should be modified."[58] More specifically, the *Notice* asks whether the Commission should: (1) clarify the "elements of a *prima facie* case" for a program carriage complaint; (2) specify new time limits on parties and adjudicating complaints; (3) revise its rules governing retaliation and frivolous complaints; and (4) adopt rules to allow programming networks to seek nationwide distribution.[59] The *Notice*, however, provides no rationales for why such modifications are needed, and a review of the Commission's experience with program carriage complaints clearly demonstrates that such modifications are *not* needed.

A. There Is No Need To Clarify or Revise the Rules for Making a Prima Facie Case.

The *Notice* asks "whether the elements of a *prima facie* case should be clarified."[60] Clarifying the prima facie elements is not necessary or feasible.

In the order implementing the Commission's program carriage rules (the "*Program Carriage Order*"), the Commission concluded that "the resolution of Section 616 complaints will necessarily focus on specific facts pertaining to each negotiation, and the manner in which certain rights were obtained."[61] The Commission "emphasiz[ed] that the statute does not

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58 *Notice* ¶ 14.

59 *See id.* ¶¶ 14-17.

60 *Id.* ¶ 14 (emphasis in original).

61 *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd. 2642 ¶ 14 (1993) ("*Program Carriage Order*"); *see id.*¶ 24 (noting that the Commission needs to "evaluate contested facts related to the parties' *specific* negotiation") (emphasis added). As for remedies, "a *case-by-case determination* of the appropriate remedies based on the specific behavior involved in a

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explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible,"[62] and recognized that any rules must "strike a balance that not only prescribes behavior prohibited by the specific language of the statute but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations."[63] Accordingly, the Commission "adopt[ed] general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors [and determined that it would] identify specific behavior that constitutes 'coercion' and 'discrimination' as [it] resolve[d] particular Section 616 complaints."[64]

The Commission noted, however, "that ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights in exchange for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616."[65] The Commission also noted that, "while [it] believe[d] that it is unnecessary to provide further illustrative guidelines, . . . behavior such as that suggested by commenters, as described [in the *Program Carriage Order*], can provide useful guidelines for case-by-case inquiry."[66] The Commission expressly noted that "[s]uch examples

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particular violation provides the only reasonable and meaningful method of enforcing Section 616." *See id.* ¶ 27 (emphasis added).

62 *Id.* ¶ 17. "Thus, in the context of good faith, arms-length discussions, multichannel distributors may negotiate for, but may not insist upon, such benefit in exchange for carriage on their systems." *Id.*

63 *Id.* ¶ 14; *see id.* ¶ 15 (noting that the rules must "preserve[] the legitimate aspects of negotiations" and not "preclud[e] legitimate business practices common to a competitive marketplace").

64 *Id.* ¶ 14.

65 *Id.* ¶ 17.

66 *Id.* Commenters described "several criteria for a prima facie showing" of discrimination, including, among other things, "a refusal to carry an unaffiliated service without reasonable business justification," disparate treatment

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may be used by complainants to develop facts to support their complaints, thus serving as models for specific allegations pertaining to unfair program carriage agreements."[67]

In the 14 years since the Commission adopted its program carriage rules, *only two complaints have been filed*, and in both cases, determinations were made that the programmers established a prima facie case but that a number of factual issues remained in dispute.[68] Neither programmer in those cases had any apparent difficulty determining the facts it needed to allege and support in order to establish a prima facie case (although, at least with respect to the *TCR* case, there was little evidence that supported the facts alleged, while there was substantial evidence that refuted those allegations). Moreover, any subsequent complainant can look to these precedents for insights about the kind of showing needed to establish a prima facie case.

Further clarification beyond that provided by the Commission's *Program Carriage Order* and its two subsequent adjudication orders is unnecessary. Demands for additional clarification are based purely on speculation. There is simply no evidence that potential program carriage complainants are not fully aware of the types of conduct that are proscribed by the Commission's rules and that can serve as the basis for a complaint.

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in marketing and promotion of competing unaffiliated services, "requiring that unaffiliated services waive rights not waived by any comparable affiliated or unaffiliated service," and "imposing more onerous technical quality standards or requirements on an unaffiliated service." *Id.* ¶ 13.

67 *Id.* ¶ 17.

68 *See In re TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion & Hearing Designation Order, 21 FCC Rcd. 8989 ¶¶ 9, 11 (2006) ("*TCR Order*"); *In re Classic Sports Network, Inc. v. Cablevision Sys. Corp.*, Memorandum Opinion & Hearing Designation Order, 12 FCC Rcd. 10288 ¶ 6 (Cable Servs. Bureau 1997) ("*Classic Sports*").

B. There Is No Need To Adopt Additional Deadlines To Expedite Carriage Complaint Procedures.

The *Notice* seeks comment on whether the Commission should adopt timelines for the resolution of program carriage complaints, including "whether specific time limits on the Commission, cable operators, or others would promote a speedy and just resolution of these disputes."[69] Although Comcast agrees that more expeditious resolution of program carriage complaint proceedings would benefit all parties involved, the Commission should not alter the established pleading cycle (which is already quite abbreviated) nor should it establish any other deadlines to govern the process. After the initial pleading cycle, any further proceedings should be governed by the professional assessments of the Media Bureau and, as appropriate, an administrative law judge of the particular circumstances of a given case.

The pleading cycle for a program carriage complaint allows a complainant up to a year to prepare its complaint, but then requires an MVPD defendant to file an answer within thirty days after being served with the complaint. After the filing of the MVPD defendant's answer, a complainant is afforded twenty days to file its reply to the answer. Thus, in all, the original pleading cycle takes no longer than fifty days.[70]

Shortening the pleading cycle is not practicable and would raise significant due process concerns. Moreover, it is wholly unnecessary. To the extent there have been delays in the resolution of program carriage complaints, they were not caused by the length of the pleading cycle.[71] Delays in the resolution of program carriage complaints are not unique to these kinds of

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[69] *Notice* ¶ 15.

[70] *See generally Program Carriage Order* ¶¶ 29-30.

[71] In the two program carriage complaint proceedings, the parties followed the Commission's expedited pleading cycle.

disputes and are the consequence of management processes and priorities internal to the Commission rather than any defect in the rules.

In its *Program Carriage Order*, the Commission noted that the decision-making process it adopted "will provide the most flexible and expeditious means of enforcing the carriage agreement provisions of Section 616" and "promotes resolution of as many cases as possible on the basis of a complaint, answer and reply."[72] "As a practical matter, however, given that alleged violations of Section 616, especially those involving potentially 'coercive' practices, will require an evaluation of contested facts and behavior related to program carriage negotiations, we believe that the staff will be unable to resolve most program carriage complaints on the sole basis of a written record[.]"[73] Accordingly, in those cases in which additional fact-finding is necessary, the Commission adopted a procedure whereby, "after reviewing the complaint, answer and reply, the staff will inform the parties of its determination that resolution of the complaint will require a hearing before an administrative law judge."[74]

The Commission has had only two occasions to address program carriage complaints. In the first, *Classic Sports*, it took the Cable Services Bureau less than four months from the date the complaint was filed (March 17, 1997), and a little over two months from the date the pleading cycle ended (May 12, 1997), to determine whether a prima facie case was made and issue an order (July 16, 1997). The parties settled the case before a hearing before an ALJ ever was scheduled, and the case was dismissed officially on December 23, 1997. Thus the

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72 *Program Carriage Order* ¶ 23. The Commission stated that "additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff," and "[d]iscovery will not necessarily be permitted as a matter of right . . . but only as needed on a case-by-case basis, as determined by the staff." *Id.*

73 *Id.* ¶ 24.

74 *Id.*

Commission's decision-making process worked exactly as the Commission intended: expeditiously and through a private settlement.

In the second case, *TCR,* it took nearly a year from the end of the pleading cycle for the Media Bureau to determine -- contrary to the substantial evidence Comcast submitted -- that TCR had made a prima facie case and to refer the case to an ALJ.[75] TCR filed its complaint on June 14, 2005; Comcast filed its answer on July 14, 2005; and the pleading cycle ended on August 3, 2005 when TCR filed its reply to Comcast's answer. Although Comcast believes that the complaint, answer, and reply provided more than enough bases for the Bureau to conclude that a prima facie case had not been made, there were at least two unusual complications. First, Comcast and TCR's owners were engaged in contentious litigation in Maryland state court regarding contractual claims that directly impacted issues relevant to carriage of MASN. Second, at the same time the Media Bureau was reviewing the complaint pleadings, it was also conducting its review of Comcast's and Time Warner's proposed acquisition of Adelphia, and TCR and other parties opportunistically attempted to incorporate the issues TCR raised into the merger review proceeding, which only served to complicate both proceedings. Under these peculiar circumstances, it is perhaps not surprising that it took almost a year to review all the pleadings and determine the next step.

In both cases, after reviewing the pleadings and supporting evidence, it was determined that additional fact-finding was necessary to resolve the complaints. In both cases, decisions were made to refer the cases to an ALJ. And in both cases, the parties were able to settle their

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[75] In the *TCR* case, TCR filed more than 1,000 pages of pleadings and attachments, to which Comcast timely responded, refuting each and every one of TCR's allegations.

disputes shortly after those referrals. Therefore, neither case provides a reason why new procedures need to be established.

In the *program access* context, when the Commission previously examined the question of imposing deadlines on its decision-making process, it recognized "that any time limits imposed must reflect the myriad circumstances and complexity inherent in the program access provisions."[76] The Commission also noted that "any time limits imposed by the Commission must afford a meaningful opportunity to pursue settlement negotiations."[77] For program access proceedings, the Commission decided that five months was a reasonable amount of time to resolve easier cases (e.g., unreasonable refusals to sell programming, petitions for exclusivity, etc.) and nine months was a reasonable amount of time to resolve more complex "program access complaints, including price discrimination cases."[78]

Taking those *program access* timelines into account, it is clear that adjudicating *program carriage* complaints would require more than nine months. In fact, establishing any deadline that the Bureau or an ALJ could meet while providing the parties due process would be difficult. The complexity of a typical program access case pales in comparison to the complexity of either of the two program carriage cases filed at the Commission.

Under the program carriage rules, the Bureau or ALJ must carefully scrutinize negotiations to determine whether permissible hard bargaining has crossed the line to an impermissible demand for equity or discrimination based on non-affiliation "the effect of which

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76 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report & Order, 13 FCC Rcd. 15822 ¶ 38 (1998).

77 *Id.* ¶ 42.

78 *Id.* ¶ 41.

is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly."[79] As the Commission noted in the *Program Carriage Order*, "resolution of Section 616 complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."[80] Plus, even if a violation were to be found, the Commission then would face the difficult task of fashioning an appropriate remedy. One possible remedy would be for the Commission to require carriage of the complaining network, but this would break entirely new ground and necessarily would require decisions about the systems on which the programming would be carried (many networks are carried on only a subset of any given operator's systems) and on which tier it would be carried (Comcast has many different tiers and specialty packages); a much more complex decision than simply setting a price for the sale of programming that is subject to the program access rules.

The complexity of program carriage cases counsels against the Commission adopting hard deadlines for either the Bureau or an ALJ to resolve program carriage complaints. Each program carriage complaint will have its own unique set of facts, and it simply is impossible for the Commission to project how long any particular case should take to resolve. Imposing generalized deadlines on an ALJ is particularly troublesome given that the ALJ is charged with conducting an investigation to resolve facts that are in dispute and then resolving the entire case and issuing a recommended order. In the *TCR* case, the Bureau "direct[ed] that an [ALJ] resolve the factual disputes . . . and return a recommended decision and a recommended remedy, if

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[79] 47 C.F.R. § 76.1301(c); *see* 47 U.S.C. § 536(a)(3). In today's video marketplace, it would be extremely difficult, if not impossible, for any complainant to show how any single MVPD's discrimination prevented an unaffiliated programming network from competing fairly.

[80] *Program Carriage Order* ¶ 14.

necessary, to the Commission within 45 days" of the stay of the *TCR Order* being lifted.[81] Even the "Rocket Docket," more properly known as the U.S. District Court for the Eastern District of Virginia, does not adjudicate cases that fast.

Based on the Commission's scant experience adjudicating program carriage complaints, there is no evidence that the program carriage complaint process is not working. The Commission should not attempt to adopt arbitrary deadlines for resolving program carriage complaints but should rely, instead, on the intelligence, experience, and professionalism of its staff to process such complaints as expeditiously as possible. If there is a need to do more, then the Bureau can use the ALJ process to reliably determine facts and impartially administer the law without political or personal agendas factoring into the equation.

C. There Is No Need To Revise the Rules Governing Retaliation or Frivolous Complaints.

The Commission asks whether it "should adopt additional rules to protect programmers from potential retaliation if they file a complaint" and "whether the existing penalties for frivolous program carriage complaints are appropriate."[82] History demonstrates no need for such measures. Of the two parties that filed the only program carriage complaints in Commission history, neither Classic Sports nor TCR ever alleged that it was retaliated against for filing its complaint.

Not a single complaint has been filed that the Commission has deemed frivolous, although in Comcast's view the TCR complaint should have been deemed so. The fact that only two complaints have been filed in the 14 years since the program carriage rules were adopted

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81 *TCR Order* ¶ 13.

82 *Notice* ¶ 16.

provides strong evidence that networks recognize that they should file a complaint only when they really believe the rules are being violated, not just because they are frustrated with their negotiations. This is precisely how the rules were intended to work, and -- again -- there is no evidence that the rules need to be changed.

D. There Is No Need for the Commission To Adopt Rules "To Allow Independent Programmers To Seek Nationwide" Distribution.

The *Notice* seeks comment on "whether the Commission should adopt rules that expressly allow independent programmers to seek nationwide access directly from multiple system operators and, if so, how such a process would operate."[83] The answer to the first question renders the second one moot.

There is nothing that prevents programmers from seeking broad distribution on an MVPD's platform, and many do so. Carriage agreements vary widely based on, among other things, the nature of the programming offered, consumers' demands, and the decision-making processes of each distributor. For example, TCR sought carriage across what it considered its MLB territory, from Harrisburg, PA to Charlotte, NC. The voluntary settlement that was reached between Comcast and TCR specified the geographic scope and timing of MASN's carriage on Comcast's systems.

Practically speaking, only DBS providers can actually distribute networks nationwide and launch them to all of their customers at the same time. Even they, however, have to make decisions about the tier in which to place a particular network. For cable operators, the process is more complicated, and carriage agreements often provide for distribution across a subset of an operator's systems, especially in the case of a network for which there is no proven demand or

[83] *Id.* ¶ 17.

track record of performance.[84] Technological capabilities differ from one system to another, as do channel line-ups and carriage obligations. So, too, consumers' demands for particular programming often vary from market to market due to demographic and other factors.

IV. THE COMMISSION SHOULD NOT ADOPT ARBITRATION PROCEDURES FOR LEASED ACCESS OR PROGRAM CARRIAGE DISPUTES.

The *Notice* inquires about "the application of arbitration procedures to resolve leased access and program carriage disputes."[85] More specifically, it asks whether the Commission should establish arbitration procedures and, if so, what types of procedures should be enacted, whether arbitration should be mandatory or elective, who should bear the costs, and what standard of review the Commission should employ in reviewing arbitration decisions.[86] The answer to the first question renders the others moot. There is no reason why the Commission needs to concern itself with the use of arbitration to address these issues.

For one thing, there is no demonstrated deficiency in the complaint process. Complaints alleging violations of the leased access rules are rare,[87] and complaints alleging violations of the program carriage rules are rarer still. For both types of complaints, Congress previously directed the agency to establish procedures for "expedited" review,[88] and in implementing this directive the Commission has already adopted "streamlined" complaint processes.[89]

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84 Even many of the longest established, best financed, best managed, and most popular cable networks do not have agreements for ubiquitous distribution.

85 *Notice* ¶ 19.

86 *Id.*

87 By the Commission's own count, a mere 70 leased access complaints have been filed in the past decade. *Notice* ¶ 1 n.1. It appears that the pace has further slowed in recent years, with only 18 leased access complaints filed in the past four years -- and most of those were duplicative complaints filed on the same day by the same complainant, but against different systems.

88 47 U.S.C. §§ 532(c)(4)(iii) (leased access), 536(a)(4) (program carriage).

89 *See 1993 Leased Access Order* ¶¶ 534-536; *Program Carriage Order* ¶¶ 20-34.

For another, there is nothing the Commission needs to do to enable parties who wish to pursue arbitration to do so. If two parties who have a leased access or program carriage dispute believe that arbitration would be a useful way to resolve their differences, they are free to do so, and the American Arbitration Association stands ready to provide arbitration services under its well-established procedures.[90] But that is a decision to be made voluntarily, by the commercial entities involved.[91]

There are numerous additional reasons why arbitration is not the panacea that some think it is. For example, an important function of administrative adjudication is to provide guidance for future conduct and future adjudications, a result that is hamstrung by using arbitration.[92] Further, an agency is directed not to use means of alternative dispute resolution where "the matter significantly affects persons or organizations who are not parties to the proceeding."[93] Suffice it to say that arbitration cannot relieve the Commission of its responsibility to adjudicate a properly filed complaint, and, if either party to such a complaint insists on its right to a decision

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[90] *See* American Arbitration Association, *Commercial Arbitration Rules and Mediation* (amended and effective Sept. 1, 2007), *available at* http://www.adr.org/sp.asp?id=22440.

[91] 5 U.S.C. §§ 572(a) (agency may use a dispute resolution proceeding "if the parties agree to such proceeding"), 575(a)(1) (arbitration to be used only "when all parties consent"); *see Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in Which the Commission Is a Party*, Initial Policy Statement & Order, 6 FCC Rcd. 5669 ¶ 12 (1991) (resort to ADR is "purely voluntary"); *In re Mediacom Communications Corp. v. Sinclair Broad. Group, Inc.*, *Emergency Retransmission Consent Complaint for Enforcement for Failure To Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion & Order, 22 FCC Rcd. 47 ¶ 25 (2007) ("The Commission does not have the authority to require the parties to submit to binding arbitration."); *1993 Leased Access Order* ¶ 537 ("ADR is voluntary [and] parties may elect it at any time").

[92] As 5 U.S.C. § 572(b)(1) instructs, "An agency shall consider not using a dispute resolution proceeding if . . . a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent."

[93] *Id.* § 572(b)(4). An arbitrator's decision that would require carriage of a particular channel could result in other channels being dropped, adversely affecting third parties in contravention of the directives of the statute.

by the Commission, a detour to the arbitration process will not accelerate that result.[94] Moreover, using arbitration in the program carriage context would severely implicate the First Amendment rights of cable operators who could be compelled to carry certain speech as well as the rights of other programmers that might be deleted from a cable system. And, in the leased access context, arbitration could not extinguish the presumption, explicitly set forth in the statute, "that the price, terms, and conditions for use of channel capacity designated [by the cable operator for leased access] are reasonable and in good faith unless shown by clear and convincing evidence to the contrary."[95]

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94 In recent comments and reply comments filed in MB Docket No. 07-29, Comcast explained why arbitration is not appropriate in program access proceedings; Comcast incorporates those pleadings here by reference. *See*, *e.g.*, Comments of Comcast Corporation, MB Dkt. No. 07-29, at 28-20 (Apr. 2, 2007); Reply Comments of Comcast Corporation, MB Dkt No. 07-29, at 39-41 (Apr. 16, 2007).

95 47 U.S.C. § 532(f).

V. CONCLUSION

There is no apparent reason why the Commission should revise either its commercial leased access or program carriage rules. The Commission's regulations governing both areas have been carefully crafted and honed through years of experience. Leased access and program carriage complaints have been infrequent and resolved effectively and efficiently. Moreover, given the success of the current rules, there is no reason for the Commission to adopt any new regulations relating to arbitration of either leased access or program carriage disputes, and the Commission lacks legal authority to do so.

Respectfully submitted,

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